82-2115

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL BANK AND TRUST COMPANY OF EVANSTON, as Trustee under a Trust Agreement, dated March 17, 1975, and known as Trust R-1809,

Appellant,

v.

EDWARD J. ROSEWELL, County Treasurer and Ex-Officio County Collector of Cook County, Illinois; THOMAS C. HYNES, Assessor of Cook County, Illinois; and HARRY H. SEMROW and SEYMOUR ZABAN, Commissioners of the Board of (Tax) Appeals of Cook County, Illinois,

Appellees.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

JAMES A. ROONEY
69 West Washington Street
Suite 2313
Chicago, Illinois 60602
(312) 332-2600

Attorney for Appellant

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether the Illinois statutory remedy for protesting real estate taxes (Ill.Rev.Stat. 1979, ch. 120, pars. 673(a), 675 and 716) violates the due process clause of the Fifth Amendment to the United States Constitution since: 1. taxes paid under protest are segregated and invested by the County Collector, but successful protestors may not receive a refund of any interest earned on the deposited funds; 2. all interest earned on the deposited funds is deposited in the county treasury and used for county purposes; and, 3. the county also keeps all interest earned on funds deposited and invested where the protest is unsuccessful.

2. Whether the decision of the Supreme Court of Illinois in this case amounts to arbitrary judicial action in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. Whether, for the purposes of obtaining equitable relief pursuant to 42 U.S.C. §1983, the Illinois remedy was an adequate remedy at law.

4. Since the Illinois remedy has been construed to allow no pre-deprivation judicial hearing, whether, under the unqiue facts here presented, a pre-deprivation judicial hearing should be allowed under the provisions of 42 U.S.C. §1983.

LIST OF PARTIES

Appellant

Illinois has no real party in interest requirement similar to Rule 17(b) of the Federal Rules of Civil Procedure. The sole beneficiary of the Plaintiff below and the Appellant herein, a bank as land Trustee, is an Illinois limited partnership, American Plaza Associates.

Appellees

The Defendants below and the Appellees herein are (1) the Collector of Taxes (Edward J. Rosewell); (2) the Assessor (Thomas C. Hynes); and (3 & 4) the Commissioners of the Board of (Tax) Appeals (Harry H. Semrow and Seymour Zaban).

28 U.S.C. §2403(b) may be applicable to this appeal. Copies of this Jurisdictional Statement have been served upon the Hon. Neal F. Hartigan, Attorney General of the State of Illinois.

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In The

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JURISDICTIONAL STATEMENT

INTRODUCTION

Appellant, First National Bank of Evanston, Trustee (plaintiff below and hereinafter referred to as "taxpayer"), appeals from the Order entered by the Supreme Court of Illinois on November 18, 1982 (Petition for Rehearing denied on January 28, 1983) which found that the Illinois statutory procedure for contesting real estate taxes did not violate the Fifth Amendment to the United

States Constitution and further held that no equitable action pursuant to 42 U.S.C. §1983 could be maintained under the facts here presented.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 93 Ill.2d 388. The opinion of the Appellate Court of Illinois is reported at 101 Ill.App.3d 459. The opinion of the trial court judge is unreported. All opinions are reproduced in the Appendix (filed separately).

JURISDICTION

The Supreme Court of Illinois specifically held that the Illinois remedy for protesting taxes, which requires payment of the taxes under protest and investment of the protest fund, but which prohibits a successful tax protestor from receiving the interest earned on the refunded taxes, does not violate the Fifth Amendment of the United States Constitution (93 Ill.2d, at 395). That Order was entered on November 18, 1982 and taxpayers' Petition for Rehearing was denied on January 28, 1983. Taxpayer filed its Notice of Appeal with the Clerk of the Supreme Court of Illinois on February 4, 1983.

On April 20, 1983, Justice Stevens entered an Order extending the time for docketing this appeal to and including June 27, 1983.

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth and Fourteenth Amendments to the United States Constitution;

42 U.S.C. §1983 (The Civil Rights Act);

Ill.Rev.Stat., 1979, ch. 120, pars. 494, 594, 673(a), 675, 710 and 716;

Illinois Public Act 82-598 (amending Ill.Rev.Stat., ch. 120, pars. 673(a) and 675).

STATEMENT OF THE CASE

The opinion of the Appellate Court of Illinois contains a complete statement of the facts here presented. (Appendix, pp. 9-16).

This case involves a challenge by a taxpayer to the assessment of its property, an office building and garage, for the tax year 1978. Real estate tax bills were issued to taxpayer based upon an assessment of $8 million. Taxpayer sued the taxing officials and the person responsible for collecting the taxes to enjoin the collection of a portion of the taxes. Taxpayer succeeded in the trial court and has paid taxes based upon an assessment of $3.9 million. The trial court permanently enjoined the collection of $725,000 in taxes.

Taxpayer's pleading sought equitable relief in state court on state grounds and, supplementally, sought equitable relief and/or damages pursuant to 42 U.S.C. §1983.

Prior to filing its action, taxpayer exhausted its administrative remedy by appealing the assessment to the review board. At the hearing before the review board, the assessor conceded that the $8 million assessment was wrong and recommended a change in assessment to $3.4 million. The review board made no reduction whatsoever.

At the hearing before the trial court judge, the employees of the assessor's office who reviewed taxpayer's file and conceded the error to the review board testified that the correct assessment, if made pursuant to the assessor's standards and guidelines, would have been $3.4 million.

A later witness, another employee of the assessor's office, was called by the taxing officials and testified that the correct assessment was not $8 million, but $4.3 million.

During closing argument, defendants' attorney argued for an assessment of $3.9 million. The trial court judge found that the correct assessment was $3.9 million.

Taxpayer called a member of the review board as an adverse witness. That witness (Commissioner Harry H. Semrow) never testified that the $8 million assessment was correct. When shown the assessor's guidelines for the assessment of office buildings, Semrow testified that he'd never before seen the assessor's guidelines. When asked if the review board reviewed assessments using the same standards the assessor used in making assessments, Semrow testified (despite a statute requiring the assessor and board of appeals to jointly issue rules and regulations concerning the assessment of property [Ill.Rev.Stat., 1979, ch. 120, par. 494] and despite a lack of statutory authority for the review board to make an original assessment [Ill.Rev.Stat., 1979, ch. 120, par. 594]) that he did

not know what the assessor did, that the board was totally autonomous and it used its own standards. However, despite repeated questioning, Semrow would not or could not reveal those standards. Both the trial court judge and the Appellate Court of Illinois characterized Semrow's testimony as "confused".

At the close of taxpayer's case, the trial court dismissed taxpayer's action brought pursuant to 42 U.S.C. §1983, stating that taxpayer had failed to prove the taxing officials had recklessly disregarded taxpayer's federally protected rights. After the trial court judge issued his Memorandum of Decision, taxpayer moved to vacate the dismissal arguing that relief under 42 U.S.C. §1983 should have been allowed under the facts presented. That motion was denied.

The taxing officials (except the assessor) appealed the entry of the injunction and taxpayer cross-appealed the dismissal of its federal action. The Appellate Court of Illinois affirmed the entry of the injunction on state grounds and affirmed the dismissal of the federal action.

The Supreme Court of Illinois reversed the entry of the injunction, finding that the Illinois statutory remedy of payment under protest and objection to the collector's suit for judgment provided an adequate remedy and affirmed the dismissal of the federal action, stating that it should be joined with the objection seeking a refund of taxes paid under protest.

Question 1 was not presented to the trial court. However, the Supreme Court of Illinois specifically decided question 1 adversely to taxpayer. It held that the retention of earned interest on refunded protest payments in the legal remedy did not violate the due process clause of the Fifth Amendment to the United States Constitu-

tion. Thus, question 1 is properly presented for decision by this Court.

Question 2 arose by the issuance of an opinion by the Supreme Court of Illinois two months after the Notice of Appeal to this Court was filed. Taxpayer submits that the opinion in that case (*Shell Oil Co., et al. v. Dept. of Revenue, et al.*, 95 Ill.2d 541 (1983) (See Appendix, pp. 61-67) is irreconcilable with the opinion in this case and, since both cases were set for argument, argued and taken under advisement the same day, the Supreme Court of Illinois, has arbitrarily and inequitably exercised its power in deciding this case using different standards than those announced in *Shell Oil Co.* Question 2 could not have been presented to the Supreme Court of Illinois, but taxpayer is presenting it at the first opportunity. *Herndon v. Georgia*, 295 U.S. 441, 443-444, 79 L.Ed. 1530, 55 S.Ct. 794 (1934).

Because of this unique factual situation, this Court should consider question 2 (or note probable jurisdiction and remand this case to the Supreme Court of Illinois for presentation of question 2).

Questions 3 and 4 ask whether taxpayer may maintain an action under 42 U.S.C. §1983 at this time in state court under the facts here presented. Taxpayer moved to vacate the dismissal of its federal action and appealed the denial of that motion. Taxpayer has consistently maintained that it should have been granted equitable relief pursuant to 42 U.S.C. §1983 under the facts here presented. The Appellate Court of Illinois did not directly respond to the questions because it affirmed the entry of the injunction on state grounds. (It did note that taxpayer's civil rights claim was asserted as another basis for obtaining the injunction). (Appendix p. 21) The Su-

preme Court of Illinois held that any federal action should be joined with a refund claim. In doing so it necessarily rejected taxpayer's claim that it was entitled to maintain an action for equitable relief under 42 U.S.C. §1983 prior to utilizing the statutory remedy.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

INTRODUCTION

This appeal involves another situation like *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982) where the Supreme Court of Illinois has refused to give retroactive application to a procedural change which would make this appeal unnecessary. (See 455 U.S., footnote 1 at 428, footnote 3 at 428). Further, because the remedy has been amended (Ill. Public Act 82-598) and the subsequent decision of the Supreme Court of Illinois in *Shell Oil Co., et al. v. Dept. of Revenue, et al.*, 95 Ill.2d 541 (1983) (See Appendix pp. 61-67) makes it unlikely that this issue will recur, "this is a case of little importance except to the litigants." (Concurrence of Justice Powell in *Logan*, 455 U.S., at 443).

However, like *Logan*, this case must be decided by this Court because the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution apply to all persons and the decision of the Supreme Court of Illinois is clearly erroneous.

This Court should decide this case to make it clear that the United States Constitution and federal law, not

merely the "equitable principles" announced in *Shell Oil Co.*, apply to litigation in the State of Illinois.

This Court might well ask: "Why is this appeal being pursued? Why doesn't this taxpayer follow the legal remedy (of paying the taxes under protest and objecting to the collector's suit for judgment) which was declared to be adequate? *Nugent v. Toman*, 372 Ill. 170, 173-174, 23 N.E.2d 43 (1939) seems to allow the filing of a late objection and thus provide a remedy."

In *Midcontinental Realty Corporation v. Korzen*, 40 Ill.App.3d 133, 351 N.E.2d 376 (1976) the trial court entered an injunction against the collection of taxes. The Appellate Court of Illinois reversed—finding that the remedy at law was adequate. In responding to the Petition for Rehearing, the Appellate Court of Illinois noted:

> "Plaintiff having failed to follow the procedure set forth in sections 194 and 235 of the Revenue Act of 1939, there is no basis upon which the Circuit Court of Cook County—either in law or equity—at this time could timely consider the allegations . . ." (351 N.E. 2d at 385-386) *Cf. Clarendon Associates v. Korzen*, 56 Ill.2d 95, 306 N.E.2d 299 (1973), separate opinion of Underwood, J., concurring in part and dissenting in part, at 306 N.E.2d 304.

Thus, it is far from clear that the "adequate" legal remedy is now available so that taxpayer may obtain a hearing on its claims which both the trial court and Appellate Court of Illinois found meritorious.*

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* When Justice Stevens entered the Order extending the time for docketing this appeal, taxpayer and the taxing officials were exploring the possibility of settling this case. However, since the entry of the Order, the taxing officials have exhibited no interest in settling this case and their attorney refuses to concede that taxpayer may now pay the taxes and receive a hearing on its state and federal claims.

I.

THE ILLINOIS REMEDY, AS IT EXISTED WHEN TAXPAYER FILED THIS ACTION TO PROHIBIT THE COLLECTOR FROM UTILIZING IT, WAS UNCONSTITUTIONAL.

The normal way assessments and, thereby, taxes are contested in Cook County, Illinois is the filing of an Answer (an "objection") when the collector files his annual *in rem* Complaint (an "application") to obtain a judgment that the amount of taxes listed in his books for that year is the correct amount. If the taxes are unpaid, a deficiency judgment is entered and the property is ordered sold to satisfy the judgment. If the assessment has been appealed to the board of appeals, the taxes have been paid in full and an objection is filed before a default judgment is ordered, the Court proceeds to determine the correct amount of taxes. If judgment is entered for less than the amount of taxes paid to the collector, he is ordered to refund the taxes overpaid. (Ill.Rev.Stat., 1979, ch. 120, pars. 675 and 716).

However, in order to contest the action brought by the collector, the taxes must be paid under protest. The statutes in effect at the time this action was brought required the collector to set aside one half of one per cent of the total taxes paid (in Cook County about $2.3 billion per year) or the amount paid under protest (whichever is less) to provide a fund from which the future refunds could be made as the objections were determined. (Ill.Rev.Stat., 1979, ch. 120, par. 675) By statute, this commingled fund was required to be invested by the collector and all interest earned upon the fund placed in the county treasury. (Ill.Rev.Stat., 1979, ch. 120, par. 673a). A successful taxpayer was unable to receive any of

this interest earned on the commingled funds.* *Clarendon Associates v. Korzen*, 56 Ill.2d 101, 306 N.E.2d 299 (1973).

Under Illinois law, equity may enjoin the collection of a tax and, thereby the collector's suit against the property, where that legal remedy is not adequate. *Hoyne Savings & Loan v. Hare*, 60 Ill.2d 84, 322 N.E.2d 833 (1974). If following a statutory remedy would result in an unconstitutional deprivation, the remedy is inadequate and equity may assume jurisdiction. *Doe v. Jones*, 327 Ill. 387, 158 N.E. 793, 55 A.L.R. 303 (1927).

Taxpayer argued that following the statutory remedy would result in the collector refunding to taxpayer its portion of the fund, but confiscating any interest earned on its portion of the fund.

Taxpayer asserted that the statutory scheme whereby a successful protestor would be deprived of the interest earned on the taxes refunded to it was a denial of due process in violation of the Fifth Amendment to the United States Constitution and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 66 L.Ed.2d 358, 101 S.Ct. 446 (1980) was dispositive of the issue. However, the Supreme Court of Illinois distinguished *Webb's* on two grounds.

First, the Supreme Court of Illinois found that, unlike this case, *Webb's* involved only private funds. However, in *Shell Oil Co., supra*, this same Supreme Court of Illinois found that protested sales tax funds are not public funds,

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* Effective January 1, 1982, Ill. Public Act 82-598 allows successful protestors to recover their pro-rata share of interest earned on the protested funds. (See Appendix, pp. 101-106)

thus quickly abandoning this ground of distinction. It stated in *Shell Oil Co.* that the successful taxpayer was:

> "simply seeking the income earned from money it was determined it had no legal duty to pay as taxes. The interest income, as it accrued, belonged neither to the State nor to the county for whose benefit the taxes were collected. The Treasurer's authority, as Trustee, to invest these funds did not effect the ownership of the funds or entitle him to keep the interest so earned." (Appendix p. 64).

It further stated in *Shell Oil Co.*:

> "At no time did the protest fund become the property of the State. The Treasurer acted merely as a trustee of the protest fund (see Ill.Rev.Stat. 1979, ch. 127, par. 172) and, as such, he is not entitled to any income or fee for his services absent statutory authorization. (See Ill.Rev.Stat. 1979, ch. 24, par. 8-11-1). The protest action was instituted simply to determine whether the county or the taxpayer was entitled to the funds paid under protest. As previously mentioned, the interest income never belonged to the State. The Treasurer could not deny the taxpayer the right to that income by transferring it to the State's general revenue fund." (Appendix, p. 65).

Second, the Supreme Court of Illinois distinguished this case from *Webb's* by treating the retention of 100% of the earned interest as an implied *in lieu* fee for the service rendered-administration of the fund. This Court had stated in *Webb's*:

> "We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders." (449 U.S. 165).

The Supreme Court of Illinois overlooked the fact that in this case the county receives another return for services rendered in connection with the remedy of payment under protest. By statute, the county is allowed to keep 100% of the interest earned on unsuccessfully protested funds. It is estimated that Cook County has received $9-10 million per year from this source.

Since both distinctions made by the Supreme Court of Illinois are invalid, *Webb's* is controlling and the statutory system, as it existed when taxpayer filed its action, violated the due process clause of the Fifth Amendment to the United States Constitution.

Moreover, in this case, the "fee" equals 100 per cent of the interest earned. Such a confiscatory fee amounts to a penalty or forfeiture in violation of the due process clause of the Fifth Amendment to the United States Constitution, *Dane v. Jackson*, 256 U.S. 589, 599, 65 L.Ed. 1107, 41 S.Ct. 566 (1921). What benefit is conferred on a successful protestor which would allow confiscation of *all* of the interest earned as a matter of course?

II.

THE DECISION OF THE SUPREME COURT OF ILLINOIS AMOUNTS TO ARBITRARY JUDICIAL ACTION IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This case and *Shell Oil Co., supra*, were both set for argument and argued on September 17, 1982. *Shell Oil Co.* was taken under advisement on that date as Agenda No. 29. This case was taken under advisement immediately thereafter as Agenda No. 30. Attorneys for tax-

payers in both cases argued that *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 66 L.Ed.2d 464, 101 S.Ct. 1221 (1980) was controlling.

In this case, the Supreme Court of Illinois viewed the conversion of accrued interest as not constitutionally prohibited; found that a successful tax protestor could not receive a refund with interest in the absence of statutory authorization; found the legal remedy otherwise adequate; and, found that taxpayer was wrongfully granted an injunction on equitable grounds.

In *Shell Oil Co.*, the Supreme Court of Illinois found that accrued interest could not be retained—even in the absence of statutory authorization to pay the interest to the successful protestor; found that "equitable considerations" would govern, while liberally paraphrasing this Court's statements in *Webb's*; and, affirmed the entry of an injunction.

Neither case makes mention of the other. While the cases are contradictory and irreconcilable, no dissents were filed in either case. Cases found to be controlling on issues of state law in this case (*Lakefront Realty Corp. v. Lorenz*, 19 Ill.2d 415, 167 N.E.2d 236 [1960] and *Clarendon Associates v. Korzen*, 56 Ill.2d 101, 306 N.E.2d 299 [1973]) are either abandoned or distinguished (*Lakefront*) or ignored completely (*Clarendon*) in *Shell Oil Co.* Taxpayer's Petition for Rehearing in this case (Appendix, pp. 55-60) is denied, but arguments made in taxpayer's Briefs and that Petition for Rehearing are adopted in *Shell Oil Co.* Illinois Public Act 82-598, which now allows refunds with interest to successful tax protestors, is found to be no indication in this case that the remedy was previously inadequate; yet, that amendment is cited at length and with apparent approval in *Shell Oil Co.* (See Appendix, pp. 63-66)

This Court has held that the due process clause applies to judicial proceedings (*Ownbey v. Morgan*, 256 U.S. 94, 111, 65 L.Ed. 837, 41 S.Ct. 433 (1920)) and has held that gross and obvious judicial error coming close to the boundary of arbitrary action may constitute a taking of property without due process. *Roberts v. New York City*, 295 U.S. 264, 277, 79 L.Ed. 1429, 55 S.Ct. 689 (1934).

The issue presented in this appeal is whether two cases involving the same legal issues, which are argued the same day and taken under advisement at the same time, should be decided using the same legal standards.

This taxpayer, because of the timing of the release of the opinions in this case and *Shell Oil Co.*, has been deprived of an opportunity to have its appeal heard and decided on the basis of Illinois law as altered by the *Shell Oil Co.* case.

Taxpayer does not believe that this Court has ever considered this precise issue which involves the due process and equal protection clauses. However, taxpayer has no doubt that this Court would find a constitutional violation if this issue was considered. Cf. The concurrence of Justice Frankfurter in *Snowden v. Hughes*, 321 U.S. 1, 16, 88 L.Ed. 497, 64 S.Ct. 397 (1944).

III.

SINCE THE ILLINOIS STATUTORY REMEDY COULD NOT FULLY COMPENSATE TAXPAYER, THE REMEDY WAS NOT AN ADEQUATE REMEDY AT LAW WHICH WOULD FORECLOSE EQUITABLE JURISDICTION UNDER 42 U.S.C. §1983.

The Supreme Court of Illinois held, as a matter of *state* law, that taxpayer had an adequate remedy at law and, therefore, state equitable jurisdiction was lacking.

The Supreme Court of Illinois further held that any action under 42 U.S.C. §1983 should be joined with the

post-deprivation refund action and that equitable relief pursuant to that statute was similarly precluded.

Since 42 U.S.C. §1983 expressly allows an action in equity, a *federal* question is presented as to whether, for the purposes of construing 42 U.S.C. §1983, the Illinois remedy at law was an adequate remedy and the decision of the Supreme Court of Illinois that the Illinois remedy was "adequate" is not binding upon this Court.

Taxpayer submits that such a remedy is not an adequate remedy at law which would preclude equitable jurisdiction under 42 U.S.C. §1983 in state court since full compensation, including the earned interest, could not be awarded.

The Supreme Court of Illinois held that this Court had found the remedy "plain, speedy and efficient" under the Tax Injunction Act (28 U.S.C. §1341) in *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 (1981) and, thus, further discussion of the issue was precluded. But, footnote 36 of the *Rosewell* opinion (450 U.S., at 528) reveals that this Court believed that interest would have to be appropriated to pay claims if the Illinois remedy was found to be inadequate. This Court was obviously concerned with the provisions of the Eleventh Amendment to the United States Constitution in ruling the way it did in *Rosewell*. The opinion of the Supreme Court of Illinois in *Shell Oil Co.* makes it clear that the Eleventh Amendment of the United States Constitution is not involved here. (See Appendix, pp. 63-64)

Since the interest is earned, but converted by operation of law under the Illinois statutory system, *Rosewell* is not dispositive of taxpayer's claim since it did not consider this issue.

In this case, if the legal remedy had been followed, the interest would have been earned and distributed to the county. Taxpayer could not have been *fully* compensated by following the post-deprivation remedy provided by the Illinois statutes. See *Matthews v. Eldridge*, 424 U.S. 319, 331, 47 L.Ed.2d 18, 31, 96 S.Ct. 893, 900-901 (1976).

For the purposes of determining whether equitable relief was available pursuant to 42 U.S.C. §1983, this Court should adopt the reasoning of the Supreme Court of Illinois as stated in *Shell Oil Co.* and find that the Illinois statutory remedy was not an adequate remedy at law.

In changing the law, in response to the opinion in *Rosewell* and, particularly, in response to the reluctant concurrence of Justice Blackmun, the General Assembly of the State of Illinois felt that the legal remedy, as it existed when this suit was filed, was "unconscionable." (Appendix, pp. 87-88).

IV.

SINCE THE ILLINOIS REMEDY HAS BEEN CONSTRUED TO ALLOW NO PRE-DEPRIVATION JUDICIAL HEARING, UNDER THE UNIQUE FACTS HERE PRESENTED, A PRE-DEPRIVATION JUDICIAL HEARING SHOULD BE ALLOWED PURSUANT TO 42 U.S.C. §1983.

The Supreme Court of Illinois held that since this taxpayer had an adequate judicial remedy at law (a post-deprivation hearing), no judicial equitable relief (a pre-deprivation hearing) was allowable. It so held despite the unusual facts presented in this case where the assessor who made the $8 million assessment had confessed an error of $4.6 million in that assessment.

The narrow issue here presented is whether a post-deprivation state legal remedy (even if "adequate") must be utilized in all cases where an illegal or excessive assessment is claimed or whether claims brought pursuant to 42 U.S.C. §1983 may be maintained in state court as a pre-deprivation judicial remedy where, as here, prior to the deprivation a massive error is confessed by the assessor which is not corrected by the reviewing board.

The Supreme Court of Illinois has ruled that whatever the factual situation involved in the assessment of a tax, a post-deprivation judicial hearing is the *only* remedy allowed except where the property is exempt or the tax is unauthorized by law (which has been construed to mean the assessor has no *power* to make the assessment. *North Pier Terminal v. Tully*, 62 Ill.2d 540, 343 N.E.2d 507 [1976]).*

This Court has held that the Tax Injunction Act (28 U.S.C. §1341) precludes a federal court from exercising its equitable power under 42 U.S.C. §1983 in state tax cases where the state provides a "plain, speedy and *efficient*" remedy (including equity jurisdiction in state court). *Rosewell v. LaSalle National Bank*, 450 U.S. 503,

* The opinion of the Supreme Court of Illinois in this case hints that equity jurisdiction would exist where no notice is given to the taxpayer and the taxpayer would not know what amount of tax he is called upon to pay prior to receiving the bill, citing *Hoyne Savings & Loan v. Hare*, 60 Ill.2d 84, 322 N.E.2d 833 (1974). However, the exception is illusory since four years after its decision in *Hoyne*, the Supreme Court of Illinois held in *Inolex v. Rosewell*, 72 Ill.2d 998, 380 N.E.2d 775 (1978) that no equitable jurisdiction existed despite the fact that the taxpayer had not been notified of his assessment prior to receiving the bill. (See further *Inolex v. Rosewell*, 50 Ill.App.3d 600, 602, 365 N.E.2d 1219, 1293 [1977]).

footnote 7 at 508, 67 L.Ed.2d 464, 471, 101 S.Ct. 1221, 1227 (1981). This Court has also held administrative remedies must be exhausted (as they were here) before state tax claims may be litigated. *First National Bank of Greeley v. Board of Commissioners of Weld County*, 264 U.S. 450, 453, 68 L.Ed. 784, 44 S.Ct. 385 (1924). (*But see Patsy v. Florida Board of Regents*, ... U.S. ....., 73 L.Ed.2d 172, 102 S.Ct. 2557 (1982) where this Court held that exhaustion is not a prerequisite to the filing of an action under 42 U.S.C. §1983).

This Court has further held that 42 U.S.C. §1983 provides a federal remedy which is supplemental to any state remedy which gives relief and the state remedy need not be first sought and refused before the federal one is invoked. *Board of Regents v. Tomiano*, 446 U.S. 478, 64 L.Ed.2d 440, 100 S.Ct. 1790 (1980); *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961).

Therefore, taxpayer asks: Why isn't a pre-deprivation action in state court pursuant to 42 U.S.C. §1983 permissible under the unique facts of this case? Why is this taxpayer forced into a post-deprivation hearing on its claims?

The Supreme Court of Illinois has raised the spectre of massive non-payment of taxes if, in cases such as this one, equity jurisdiction is allowed. The reasoning of the Supreme Court of Illinois has always been that assessment officials are presumed to have done their job properly, the taxes are presumed to be correct and, therefore, the orderly functioning of state government allows a deprivation (the payment of the tax) before the judicial hearing on the propriety of the tax may be held.

This Court historically has shared the same concern. The regular collection of taxes is necessary to keep state government functioning in an orderly manner. (See *Rose-*

well v. LaSalle National Bank, 450 U.S. 503, 67 L.Ed.2d 464, 101 S.Ct. 1221 (1981); *Fair Assessment in Real Estate Assoc. v. McNary*, 454 U.S. 100, 70 L.Ed.2d 271, 102 S.Ct. 177 (1981); and, *California v. Grace Brethren Church*, ... U.S ....., 72 L.Ed.2d 93, 102 S.Ct. 2498 (1982).)

This Court has stated that taxpayers must use state court remedies to protect their federal rights (*Fair Assessment*, 454 U.S., at 116). However, this Court has not held that relief pursuant to 42 U.S.C. §1983 is not an available supplemental remedy in state court.

In deciding whether a post-deprivation remedy may be allowed, this Court, in cases decided since *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), has focused on whether: 1. there is a necessity for quick action by the State (this is sometimes referred to as an important governmental or general public interest in need of protection. 407 U.S., at 91); and 2. it is impracticable to hold a pre-deprivation hearing. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436-437, 71 L.Ed.2d 265, 278-279, 102 S.Ct. 1148, 1158 (1982).

In the present case, prior to the issuance of any tax bills, the assessor had confessed a $4.6 million error in the $8 million assessment of taxpayer's property. In such a case there is no presumption that the tax is correct and there is no necessity for quick action to collect the tax.*

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* The Illinois statutory remedy provides that when the tax is collected, but it is protested, the collector segregates and does not distribute funds. Therefore, government is not really funded (except the county which receives the interest earned on the protested funds which are due either the various taxing bodies or the taxpayer, not the county) when taxes are paid under protest. (Ill.Rev.Stat., 1979, ch. 120, pars. 673(a) and 675)

Moreover, it is not impractical to have a court hold a hearing on the validity of the tax prior to its collection under these circumstances.

The county taxing officials, in responding to this Jurisdictional Statement, will undoubtedly argue that taxpayer has already had two pre-deprivation hearings—before the assessor and before the board of appeals. However, taxpayer states that post-deprivation hearings are permissible only where the deprivation is based upon reliable pre-deprivation findings. In other words, what is the risk of an erroneous deprivation despite the pre-deprivation hearing and what is the probable value of additional safeguards? *Matthews v. Eldridge*, 424 U.S. 319, 343-347, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).

In the present case, the assessor, the person who made the assessment, confessed error in the hearing he gave. The board of appeals, despite the assessor's confession of error, despite a statute that required it and the assessor to jointly make rules and regulations for the assessment of property (Ill.Rev.Stat., 1979, ch. 120, par. 494), and despite a lack of statutory authority to make an original assessment (Ill.Rev.Stat., 1979, ch. 120, par. 594), felt it was totally autonomous and, at its hearings, could use its own standards—which it declined to reveal. When shown the assessor's guidelines for assessing office buildings, a member of the board of appeals who had been on the board for the previous ten years testified that he'd never seen the guidelines before. (Record on Appeal, R-82) The Appellate Court of Illinois found that the hearing before the board of appeals was so arbitrary that it was a violation of due process.

The unique facts in this case demonstrate there is a great risk of erroneous deprivation (the trial court en-

joined the collection of nearly $725,000 in taxes) and the pre-deprivation "hearings" before the assessor and board of appeals are based upon unreliable pre-deprivation findings. An additional, pre-deprivation hearing was a necessity to prevent a due process violation.

The trial court judge in this action granted an injunction on state equitable grounds, but dismissed taxpayer's Count II seeking equitable relief and/or damages under 42 U.S.C. §1983. In doing so it found that the taxing officials had not recklessly disregarded the federally protected rights of the taxpayer. Taxpayer has consistently argued that in doing so the trial court applied a standard (objective good faith) applicable to damage awards and that only a threatened imminent deprivation of a federally protected right by the taxing officials need be shown to obtain equitable relief under 42 U.S.C. §1983.

This Court apparently has never ruled upon this question (*Harlow v. Fitzgerald*, ... U.S. ....., 73 L.Ed.2d 396, footnote 34 at 411, 102 S.Ct. 2727, 2739 [1982]), but other federal courts have ruled that a presently existing actual threat to federally protected rights may be enjoined. *Raitport v. Provident Nat. Bank*, 451 F.Supp. 522 (D.C. Pa. 1978); *Hosey v. Club Van Cortlandt*, 299 F.Supp. 501 (D.C. N.Y. 1960).

In this case the collector's suit against taxpayer's property to obtain a judgment and order of sale of the property was imminent. (Ill.Rev.Stat., 1979, ch. 120, par. 710). In addition to the forfeiture of earned interest, if the legal remedy was followed, collection of the tax would have violated taxpayer's clearly established federally protected rights to:

1. Not receive a discriminatorily high assessment or tax. This right arises under the equal protection

clause of the Fourteenth Amendment to the United States Constitution. *Raymond v. Chicago Traction Co.*, 207 U.S. 20, 38, 52 L.Ed. 78, 28 S.Ct. 7 (1907); *Cumberland Coal Co. v. Board*, 284 U.S. 23, 28-29, 76 L.Ed. 146, 52 S.Ct. 48 (1931);

2. Have its claims reviewed by the board of appeals using the same standards the assessor uses in making assessments. This right also arises under the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Green v. Louis. and Interurban R.R. Co.*, 244 U.S. 499, 514, 61 L.Ed. 1260, 37 S.Ct. 48 (1916); *Raymond v. Chicago Traction Co.*, 207 U.S. 20, 38, 52 L.Ed. 78, 28 S.Ct. 7 (1908); and
3. Have its claims reviewed by the board of appeals using ascertainable standards. This right arises under the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and includes the right to know the claims of the opposing party and to meet them. *Morgan v. U.S.*, 304 U.S. 1, 17-22, 82 L.Ed. 1129, 58 S.Ct. 773 (1937). In the present case, the assessor, taxpayer's supposed opposing party, had conceded error before the board of appeals in the assessment of taxpayer's property and, under Illinois law, the board of appeals merely reviews assessments. It has no statutory authority to make an assessment on its own. (Ill.Rev.Stat., 1981, ch. 120, par. 594)

Under the facts here presented, equitable pre-deprivation relief pursuant to 42 U.S.C. §1983 should have been granted.

CONCLUSION

In *Rosewell*, this Court narrowly approved the Illinois remedy and taxpayer believes this Court would have reached a different conclusion had it known that the collector (a mere stakeholder in the process) was investing protested tax payments and converting the interest for the benefit of the county.

Moreover, this Court has virtually removed the assessment of state taxes from federal scrutiny. (*Rosewell, supra*; *Fair Assessment, supra*; and, *Grace Brethren Church, supra.*)

Finally, by applying the principles of collateral estoppel and *res judicata* to actions brought pursuant to 42 U.S.C. §1983 (*Allen v. McCurry*, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 411 [1980]; *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 [1982]), this Court has created a situation where it must ensure that state taxpayers receive a "fair shake" on their federal claims by a full and fair hearing in state courts.

The questions presented by this appeal are so substantial they merit plenary consideration by this Court. Probable jurisdiction should be noted.

In the event this Court feels it has no jurisdiction of this case by appeal, taxpayer requests that this Jurisdictional

Statement and supporting papers be considered as a Petition for a Writ of Certiorari.

Respectfully submitted,

JAMES A. ROONEY
69 West Washington Street
Suite 2313
Chicago, Illinois 60602
(312) 332-2600

Attorney for Appellant
(Admitted July 25, 1974)

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